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In The
Supreme Court of the United States

OCTOBER TERM, 1941

No. 603

JOHN C. CURRY, individually and as Commissioner of Revenue of the State of Alabama, Petitioner,

vs.

UNITED STATES OF AMERICA and DUNN CONSTRUCTION COMPANY, INC. and JOHN S. HODGSON & COMPANY, partners, doing business as DUNN CONSTRUCTION COMPANY, INC. AND JOHN S. HODGSON & COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the Circuit Court of Montgomery County, Alabama, in Equity (R. 124, 125), is not reported.

The opinion of the Supreme Court of Alabama (R. 131, 132) has not been officially reported, but such opinion and the dissenting opinion therein may be found in 3 So. (2d) 582.

JURISDICTIONAL STATEMENT

The decree of the Supreme Court of Alabama was entered on July 29, 1941 (R. 130). The petition for writ of certiorari was filed on September 11, 1941 (R. 136), and was granted on October 13, 1941. The jurisdiction of this Court rests on Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the decree below sustained a right or immunity claimed by the respondents under the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the assessment of a tax under the Alabama Use Tax Act with respect to the storage, use, or other consumption of tangible personal property by contractors storing, using, or otherwise consuming the same under and pursuant to a "Cost-Plus-a-Fixed Fee Construction Contract" with the United States is repugnant to the Constitution of the United States.

2. Whether the United States, by the terms of such contract, validly consented to the payment of such tax by the contractors and to the reimbursement thereof as part of the cost of construction.

STATUTES INVOLVED

The pertinent provisions of the Alabama Use Tax Act (General Acts of Alabama, Regular Session and Special Session, 1939, p. 96), and of the Acts of Congress (Military Appropriation Act, 1941, Public No. 611, 76th Congress, 3d Sess., c. 343, the Act of July 2, 1940, Public No. 703, 76th Cong., 3d Sess., c. 508, and the Act of October 9, 1940, Pub. No. 819, 76th Cong., 3d Sess., c. 787), are printed in the Appendix, *infra*.

STATEMENT

All of the tangible personal property, the storage, use or consumption of which is involved in said assessment related to materials purchased at retail by the respondents, Dunn Construction Company and John S. Hodgson & Company, from points outside of the State of Alabama under and pursuant to a "Cost-Plus-a-Fixed Fee Construction Contract" with the United States, for the construction of a complete tent camp at the military reservation known as Fort McClellan in the State of Alabama (R. 64).

Such contract was executed under the authority of Acts of Congress, namely, the Military Appropriation Act, 1941, Public No. 611, 76th Cong., 3d Sess. c. 343, and the Act of July 2, 1940, Public No. 703, 76th Cong., 3d Sess., c. 508, (Appendix, infra, pp. 60, 61)

Under the provisions of Section IX of the Alabama Use Tax Act, the assessment was made on May 8, 1941, against the respondents, Dunn Construction Company, Inc., and John S. Hodgson and Company, covering the period beginning January 1, 1941, and ending March 31, 1941, in the amount of Forty-six and 26/100 Dollars ($46.26), being an amount equal to two per cent (2%) of the sales price of such property, together with the sum of Four and 63/100 Dollars ($4.63) as penalty, and the sum of 23/100 Dollars ($.23) interest, amounting in the aggregate to the sum of Fifty-one and 12/100 Dollars ($51.12) (R. 49).

The respondent contractors on the same day paid to the State Department of Revenue, under protest, the amount of said assessment. (R. 49).

Under the provisions of Section XXIV of such Act, the respondent contractors, together with the United States of America, filed a petition in the Cir-

cuit Court of Montgomery County, Alabama, in Equity, against John C. Curry, as Commissioner of Revenue, praying for a declaratory judgment to determine the liability of the respondent contractors for the amount so paid or their rights to a refund thereof (R. 1-41; amended petition R. folio 40-46).

The trial Court upheld the validity of the assessment (R. 124, 125), from which an appeal was taken by the respondents to the Supreme Court of Alabama (R. 125, 126).

In the trial of the cause in the Circuit Court and on appeal in the Supreme Court, the respondents contended that the "storage, use, or other consumption of the tangible personal property which is the subject of the tax in controversy were the storage, use, or other consumption by the United States or by an agency or instrumentality of the United States on behalf of the United States, and are constitutionally immune from taxation by the State of Alabama," and that the United States had not consented to the imposition of the tax in controversy.

The petitioner contended that the tax as imposed upon the respondent contractors was valid; that the storage, use, or other consumption which was the basis of the tax was a storage, use, or other consumption by the respondent contractors, a private corporation and partnership composed of individuals, both engaged in business for private profit, who were not acting as instrumentalities of the United States; that the imposition of the tax upon the contractors

did not constitute an undue burden upon the United States; that the United States waived any immunity with respect to such tax in that: by the terms of the contract the United States consented to the payment by said contractors of such taxes, and provided for the reimbursement thereof, as a part of the cost of such construction.

On July 29, 1941, the Court below rendered its final decision, one Justice dissenting; and on the authority of the decision in the companion case in such Court of *King and Boozer vs. State of Alabama*, 3 So. (2d) 572, reversed the decree of the trial Court and rendered a final decree in favor of the respondents and against the petitioner (R. 131-132).

This is a companion case to No. 602, *State of Alabama, Petitioner, v. King and Boozer et als.*, in which certiorari was granted on October 13, 1941.

The purchases of all the property and the storage, use, or consumption thereof involved in said assessment took place in substantially the same manner as particularly stipulated with respect to certain roofing material purchased by the contractors from the Certainteed Products Company of Atlanta, Georgia (R. 64, 65). The contractors submitted the purchase order to Certainteed Products Corporation of Atlanta, Georgia, and the materials therein ordered were shipped by such vendor by freight from Atlanta, Georgia, to "United States Construction Quartermaster, at Fort McClellan, Alabama, Ac-

count of Dunn Construction Company, Inc., and John S. Hodgson & Company." Such materials, upon arrival at destination, were unloaded, and after being inspected by representatives of the contractors and the United States, were placed in a general warehouse located within said Fort McClellan, which warehouse belonged to the United States, and was used for the storage of materials purchased in connection with the performance of said contract. Such materials were thereafter withdrawn and used by contractors as and when needed by them in the performance of said construction contract (R. 65; 66).

After delivery of the goods to the respondent contractors and the payment therefor by the contractors with their own funds (R. 66), they received reimbursement therefor from the United States (R. 67). The invoice rendered the contractors did not include the Alabama sales or use tax (R. 74); and no such tax was paid to the State of Alabama by either the vendor or the contractors prior to the making of said assessment. (R. 67).

The essence of said contract is that the contractors were obligated to "furnish the labor, materials, tools, machinery, equipment, facilities, supplies not furnished by the Government, and services, and do all things necessary for the completion of the following work: Construction of a complete tent camp * * * * * * * * * * *" at Fort McClellan in the State of Alabama in "accordance with the drawings and specifications or instructions contained in appendix 'A' hereto attached and made a part hereof, or to be furnished hereafter by the Contracting Officer and sub-

ject in every detail to his supervision, direction, and instructions" (R. 14); and were to receive from the United States in consideration for their undertaking under the contract the following:

"(a) Reimbursement for expenditures as provided in Article II.

"(b) Rental for Contractor's equipment as provided in Article II.

"(c) A fixed fee in the amount of One Hundred Twenty-eight Thousand Eight Hundred Sixty-five Dollars ($128,865.00) which shall constitute complete compensation for the Contractor's services, including profit and all general overhead expenses." (R. folio 16)

The total estimated cost of the construction, exclusive of the contractors' fee, was "THREE MILLION TWO HUNDRED FOUR THOUSAND AND FIVE HUNDRED EIGHTY-EIGHT DOLLARS ($3,204,588.00), as stated in Article I (R. 15).

Article II of the contract, among other things, provided as follows:

Paragraph 3 of Article I of the contract contained the following provision with respect to title to materials purchased by the contractors, viz:

"3. The title to all work, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under Article II, shall vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this contract." (R. 16).

Article V of the contract under the head of "Special Requirements" contained, among other provisions, the following:

"1. The contractor hereby agrees that he will:"

"(b) Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America, of the State, Territory, or subdivision thereof wherein the work is done, or of any other duly constituted public authority."

"(c) Unless this provision is waived in writing by the contracting officer, reduce to writing every contract in excess of two thousand dollars ($2,000) made by him for the purpose of the work hereunder for services, materials, sup-

plies, machinery, or equipment, for the use thereof; insert therein a provision that such contract is assignable to the Government; make all such contracts in his own name, and not bind or purport to bind the Government or the Contracting Officer thereunder. No purchases without the prior approval of the Contracting Officer." (R. 24)

The purchase orders, as shown by copy of a typical purchase order (R. 71, 72, 73), after approval by the Constructing Quartermaster, were given by the contractors to the vendors. Said purchase orders contained the following shipping instructions:

"Ship To: UNITED STATES CONSTRUCTING QUARTERMASTER At Fort McClellan, Ala.

For account of Dunn Construction Co., Inc., and John S. Hodgson & Co." (R. 71)

The following, among other statements, were endorsed on the purchase orders:

"This order is placed for the benefit of, and is assignable to, the United States Government.

"This Purchase Order does not bind, nor purport to bind, the United States Government or Government officers thereunder." (R. 72)

The following, among other instructions, were endorsed on each purchase order:

"2. Immediately upon shipment mail to Dunn Construction Co., Inc., and John S. Hodgson & Co., at Fort McClellan, Ala.:

"A. Original and two (2) copies of Bill of Lading, or shipping papers.

"Bills of Lading, etc., must read

United States Construction Quartermaster
at Fort McClellan, Ala.

Account of Dunn Construction Co., Inc., and John S. Hodgson & Company and must also bear Purchase Order Number.

"B. Six (6) copies of invoice, properly filled and certified as follows:

"I certify that the above bill is correct and just; that payment therefor has not been received; and that except as noted below or otherwise indicated herein all unmanufactured articles, materials, or supplies furnished under this invoice have been mined or produced in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States; and that State or local sales taxes are not included in the amounts billed." (R. 72)

In addition to the exhibits attached to the agreed statement of facts, four other exhibits were introduced on behalf of the complainants in the Court below. These exhibits were numbered one to four, inclusive, and are as follows:

Exhibit B to State of Evidence (R. 107-110) is a letter, designated as fixed-fee letter No. 5, from the office of the Quartermaster General of the War Department at Washington, D. C., to Constructing Quartermasters throughout the country, and deals with the relations between the Constructing Quartermaster and the contractor on a cost-plus-a-fixed-fee contract.

Exhibit C to Statement of Evidence (R. 111-115) is a letter dated February 19, 1941, designated as Construction Division Letter No. 101, from the office of the Quartermaster General of the War Department at Washington, D. C., to all zone Constructing Quartermasters, to all local Constructing Quartermasters, to all architect-engineers, and to all construction contractors dealing with the responsibility of local Constructing Quartermasters and their relationship with architect-engineers and construction contractors on projects.

Exhibit A to Statement of Evidence (R. 89-107) is designated as "SUPPLEMENT TO GUIDE FOR CONSTRUCTING QUARTERMASTERS REVISED 1940 COVERING FIXED FEE PROJECTS," and was issued by the office of the Quar-

termaster General on August 27, 1940. The matter contained in this supplement was stated to be intended as general information only to aid the Constructing Quartermasters and their assistants in connection with fixed-fee contracts covering construction work.

Exhibit D to Statement of Evidence (R. 115-120) is a stenographic report of a conference held in Washington, D. C., on September 6, 1940, with Mr. W. R. J. Dunn, of the Dunn Constructing Company, Inc., and Mr. John S. Hodgson of John S. Hodgson and Company, of Birmingham, Alabama, representing the contractors, and Lieutenant-Colonel E. G. Thomas, Mr. H. W. Loving, and Mr. R. J. O'Brien, representing the Government, relating to the construction of Camp McClellan, Alabama.

SPECIFICATION OF ERRORS

The Supreme Court of Alabama erred:

1. In holding that the assessment made against the respondents, Dunn Construction Company, Inc., and John S. Hodgson and Company, under the provisions of the Alabama Use Tax Act, was repugnant to the Constitution of the United States.

2. In holding that the storage, use, or other consumption of tangible personal property by the respondents, Dunn Construction Company, Inc., and John S. Hodgson and Company, pursuant to a "Cost-Plus-a-Fixed-Fee Construction Contract" with the United States was constitutionally immune from the Alabama Use Tax.

3. In holding that such contractors were not independent contractors, but were instrumentalities or agents of the United States, in purchasing, storing or using the tangible personal property involved in said assessment.

4. In holding that the United States had not authorized or consented to the payment of said tax by

such contractors as a part of the cost of the construction.

5. In rendering its final decree of July 29, 1941, reversing the decree of the Circuit Court of Montgomery County, Alabama, in Equity, and in rendering a decree in favor of respondents against petitioner.

SUMMARY OF ARGUMENT

I.

THE STORAGE OR USE OF TANGIBLE PERSONAL PROPERTY PURCHASED AT RETAIL BY CONTRACTORS UNDER A COST-PLUS-A-FIXED-FEE CONSTRUCTION CONTRACT WITH THE UNITED STATES IS SUBJECT TO THE ALABAMA USE TAX.

A. THE NATURE OF THE TAX INVOLVED.

The tax involved in this case is a use tax, a non-discriminatory excise tax upon the storage or use of tangible personal property purchased at retail, and is imposed at the same rate as under the Alabama Sales Tax Act, to which Act the Alabama Use Tax Act is complementary. Property purchased subject to the Sales Tax is exempted from the use tax.

The use tax is imposed upon the consumer, which term is specifically defined in the Act. There is no provision authorizing or requiring the consumer to pass on the use tax.

B. THE TANGIBLE PERSONAL PROPERTY WAS "STORED, USED, OR OTHERWISE CONSUMED" BY THE CONTRACTORS WITHIN THE MEANING OF THE ALABAMA USE TAX ACT.

The materials were purchased by the contractors, in their own names, with their own funds, for construction purposes, and not for "sale in the regular course of business". Such a purchase constituted a purchase at retail as defined in the Act. Upon delivery, the materials were stored or used by the contractors within the meaning of such terms as defined in the Act.

No provision in the contract or in the Act under which the contract was executed authorized the contractors to purchase as agents for the Government. The contract specifically prohibited them from bind-

ing or purporting to bind the Government, of which limitation the vendor was given notice endorsed upon the order.

The retention of the property, or the exercise or claim of any property right therein by the contractors constituted a taxable incident under the Act. The transactions had a "taxable moment."

C. THE CONTRACTORS IN THE PURCHASE AND USE OF THE MATERIALS, WERE INDEPENDENT CONTRACTORS.

The legislative history and an analysis of the several Acts of Congress authorizing the execution of the Cost-Plus-a-Fixed-Fee form of contract in connection with the National Defense Program clearly show that Congress did not intend to change the status of the contractor to that of an instrumentality of the Government, with respect to any of his activities.

See brief of Petitioner in the companion case No. 602 for further discussion on this point.

D. THE CONTRACTORS WERE NOT INSTRUMENTALITIES OF THE UNITED STATES.

See brief of Petitioner in the companion case No. 602.

E. THE POWER OF THE STATE TO IMPOSE NONDISCRIMINATORY TAXATION UPON INDEPENDENT CONTRACTORS IS NOT AFFECTED BY THE FORM OR TERMS OF THE CONTRACT.

See brief of Petitioner in the companion case No. 602.

F. THE GOVERNMENT'S IMPLIED CONSTITUTIONAL IMMUNITY FROM STATE TAXATION DOES NOT EXTEND TO INDEPENDENT CONTRACTORS.

See brief of Petitioner in the companion case No. 602.

G. THE TAX IS NOT INVALID BY REASON OF THE RATE OR AMOUNT THEREOF.

See brief of Petitioner in the companion case No. 602.

II.

THE UNITED STATES CONSENTED TO THE TAX UPON THE CONTRACTORS

Under Article II 1 (m) of the contract, State sales and use taxes which might apply with respect to materials, and which were required to be paid by the contractor, were included as expenditures constituting a part of the cost of construction, and

reimbursable as other items of cost. Such provision was in the particular form of contract authorized by Congress to be executed in this instance (Act of July 2, 1940, Public No. 703, 76th Congress, 3d Session, c. 508, Appendix, *infra*, p. 58). It was, therefore, duly authorized, and is binding upon the Government.

Congress had already refused to authorize any change in the status of the contractors, or to immunize or exempt them from such State taxation (Rejection of Senate Amendment No. 120 to H. R. 8438, (Act of June 11, 1940, Pub. No. 588, 76th Cong., 3d Sess. c. 313), Congressional Record, 76th Congress, 3d Session, Vol. 86, Part 7, pp. 7518, 7527-7539).

Also, the Congress thereafter, in the passage of the Buck Resolution, (Act of October 9, 1940, Public, No. 819, 76th Congress, 3d Session, c. 787, Appendix, *infra*, p. 61), expressly consented to the application of sales and use taxes upon Federal areas, effective after December 31, 1940. One of the purposes of such Act was to remove any barriers to the imposition of such State taxes with respect to the operations of Government contractors upon Federal areas.

III

THE USE TAX APPLIED WITH RESPECT TO MATERIALS STORED OR USED BY THE CONTRACTORS WITHIN THE MILITARY RESERVATION OF FORT McCLELLAN, ALABAMA.

By the passage of the Buck Resolution (Act of October 9, 1940, Public, No. 819, 76th Congress, 3d Session, c. 787, effective after December 31, 1940), jurisdiction over Federal areas was restored to the States, specifically with respect to the application of sales and use taxes. The transactions here involved occurred after the effective date of such Act.

ARGUMENT

I.

THE STORAGE OR USE OF TANGIBLE PERSONAL PROPERTY PURCHASED AT RETAIL BY CONTRACTORS UNDER A COST-PLUS-A-FIXED-FEE CONSTRUCTION CONTRACT WITH THE UNITED STATES IS SUBJECT TO THE ALABAMA USE TAX.

A. THE NATURE OF THE TAX INVOLVED.

The tax here involved, referred to as a "use tax", is a non-discriminatory tax levied under the provi-

sions of the Alabama Use Tax Act (General Acts of Alabama, Regular Session, 1939, pp. 96-109).

Section II of this Act (Appendix, *infra* pp. 43, 44) imposes an excise tax "on the storage, use or other consumption in this state of tangible personal property purchased at retail on and after the effective date of this act, for storage, use or other consumption in this state at the rate of two (2) per cent of the sales price of such property," except as provided in subsection (b) of said section where a lesser rate (½ of 1%) is imposed with respect to automobile vehicles.

Section III contains provisions expressly exempting property, the gross proceeds of sales of which are required to be included in the measure of the tax imposed by the Alabama Sales Tax Act. This section also exempts, *inter alia*, the following:

> "(b) Property, the storage, use or other consumption of which this state is prohibited from taxing under the constitution or laws of the United States of America or under the constitution of this state." (Appendix *infra*, p. 43).

The tax is required to be paid by the consumer to any seller "engaged in the business of selling at retail in this State" (Section IV), otherwise the consumer is required to report and pay the tax directly to the State (Section VI).

Section I (e) provides: "Sales of building materials to contractors, builders or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold."

In subsection (g) and (h) of Section I the terms "storage" and "use" are defined as follows:

> "(g) The term 'storage' means and includes any keeping or retention in this State for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased at retail."

> "(h) The term 'use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, or by any transaction where possession is given, except that it shall not include the sale of that property in the regular course of business."

The Alabama Use Tax Act is complementary to the Alabama Sales Tax Act; and, therefore, such Acts should be construed as companion measures.

In practical effect, the use tax prevents discrimination, in trade or tax, against retailers within the State. It equalizes the tax burden, so that the consumer within the State will bear the same tax bur-

den whether he buys within or from without the State.

As stated by Mr. Justice Cardozo in the case of *Henneford v. Silas Mason Company*, 300 U. S. 577, 582, 583 (1937):

> "* * * A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate."

See:

Monamotor Oil Co. v. Johnson,
292 U. S. 86, (1934).

Henneford v. Silas Mason Co.
300 U. S. 577, *supra.*

Felt & Tarrant Mfg. Co. v. Gallagher,
306 U. S. 62 (1939).

Southern Pacific Co. v. Gallagher,
306 U. S. 167 (1939).

The above cited cases support the conclusion that the storage, use, or other consumption of tangible personal property, after its interstate journey has ended, are proper subjects of state taxation. As expressed by Mr. Justice Stone (now Mr. Chief Justice

Stone), in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 52, (1940):

> "As we have often pointed out, there is no distinction in this relationship between a tax on property, the sum of all the rights and powers incident to ownership, and the taxation of the exercise of some of its constituent elements."

By a comparison of the Alabama Use Tax Act (Appendix, *infra*, p. 40) with the Alabama Sales Tax Act, (See Appendix, pp. 84-96, in brief in the companion case of *State of Alabama, Petitioner, v. King & Boozer, et al*, No. 602), it will be seen that, in effect, the Use Tax Act imposes the same tax burden as the Sales Tax Act, with respect to tangible personal property, but exempts property, the gross proceeds of sales of which are required to be included in the measure of the sales tax.

B. THE TANGIBLE PERSONAL PROPERTY WAS "STORED, USED, OR OTHERWISE CONSUMED" BY THE CONTRACTORS WITHIN THE MEANING OF THE ALABAMA USE TAX ACT.

The tangible personal property involved in this assessment was purchased by the contractors and was "purchased, shipped, delivered, paid for, stored, used or consumed, and reimbursement therefor made in substantially the same manner" as detailed with respect to a particular transaction involving the

purchase of building materials, namely, roofing, purchased from Certainteed Products Company, Atlanta, Georgia, except for differences in the name of the vendors, location of vendors and points of origin or shipment from points outside the State to Fort McClellan (R. 64, 65); and all of such property was used by said contractors, in the manner stated, in the performance of said contract, during the tax period covered by such assessment, namely, January 1, 1941, to March 31, 1941 (R. 68).

The typical transaction detailed in the statement of facts shows that certain roofing material was purchased by the contractors, Dunn Construction Company, Inc., and John S. Hodgson and Company, from the Certainteed Products Company of Atlanta, Georgia, pursuant to and for use in the performance of their contract with the United States. The purchase order was placed by the contractors, in their own names, on January 16, 1941 (R. 65). On January 20, 1941, the materials were shipped (R. 66), and were received by the contractors at Fort McClellan, Alabama, on January 20, 1941, as shown by the Receiving and Inspection Reports (R. 73, 74). The shipment of such materials was consigned to the "United States Construction Quartermaster at Fort McClellan, Alabama, for account of Dunn Construction Company, Inc., and John S. Hodgson and Company" (R. 65). The invoice therefor, pursuant to instructions on the order, was rendered to and only against the contractors and stated thereon "Sold to: Dunn Construction Co., Inc. & John S. Hodgson & Co. Ft. McClellan, Ala." (R. 74). The invoice was

received February 8, 1941, (R. 66), and within 48 hours from the date of the approval of the invoice (February 20, 1941), the amount thereof was paid by the contractors to the vendor by check drawn by the contractors upon their joint account in The First National Bank of Anniston, Alabama, and which check was duly paid upon presentation (R. 66, 67). Thereafter, on March 5, 1941, the contractors submitted to the Government a voucher for reimbursement for such purchase, which voucher was paid on March 11, 1941 (R. 67). No sales or use taxes were paid to the State of Alabama with respect to any of such materials before the making of such assessment (R. 68). The amount of the assessment, including penalty and interest thereon to May 8, 1941, was $51.12 (R. 9), and was paid by the contractors under protest on May 8, 1941 (R. 12).

After delivery of the materials at Fort McClellan, Alabama, it was shown that, as and when the contractors required said materials in such construction work, the same were withdrawn by them and used by them in such construction work, in the performance of said contract (R. 66); all of which materials it was stipulated were so used during the period from January 1, 1941, to March 31, 1941 (R. 68).

During the interim from the delivery of the materials to the time of their actual use in the construction, it appears that the materials remained in a general warehouse belonging to the United States,

located within Fort McClellan, in which all of such materials so purchased were stored, until required by the contractors in the construction work, when the same were withdrawn by them and used in the construction work in the performance of said contract. (R. 66).

The record, therefore, clearly establishes that the transactions involved in the assessment, as to both purchase and use by the contractors, occurred during the period of the assessment, namely, between January 1, 1941, and March 31, 1941.

The specific incident constituting the storage or use by the contractors may be referred to the "keeping or retention" of the property, which would include (a) the receiving and inspection of the materials at destination (R. 66, 73, 74), an act performed for the contractors by their own employe; or (b) the subsequent placing of the materials in the storage warehouse; or (c) the exercise of any right or power over the property incident to the ownership thereof, even such as a transfer of title to the Government, other than a sale in the regular course of business.

Such incidents were defined as taxable in subsections (g) and (h) of Section I of the Act (Appendix, *infra*, pp. 41- 42), and the occurrence of one or more of such incidents was established by the evidence. However, we do not concede that such title, if any, as vested in the Government before installa-

tion prevented the application of the tax on the contractors for their "storage or use" of the property before it became affixed to the realty. Such storage or use has been construed by this Court as taxable, and proof thereof as having been established by the slightest retention or exercise of a right of ownership of the property after it has ceased its interstate journey. See *Sou. Pac. Co. v. Gallagher*, 306 U. S. 167, 176, 177, *supra; Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62, 67, *supra;*

Henneford v. Silas Mason Co., 300 U. S. 577, 582, 583, *supra;*

McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, *supra;*

Pacific Telephone and Telegraph v. Gallagher, 306 U. S. 182, 187 (1939);

Cf. *Dept. of Treasury of the State of Indiana v. Wood Preserving Corp.*, 85 L. Ed. 817 (1941).

The prior approval by the Constructing Quartermaster of the contractors' purchase orders did not prevent the purchase from being made by the contractors. Such orders are not susceptible of any construction that the purchase was being made by the United States, or by the contractors in the capacity of agents for the Government, for the reason that the contractors were required to endorse on each order the statement, "This purchase order does not

bind, nor purport to bind, the United States Government or Government officers thereunder." (Article V 1 (c) of the contract, (R. 24, 25).

The endorsement on the purchase order of the statement, "This order is placed for the benefit of, and is assignable to, the United States Government", did not change the terms of the contract of sale between the vendor and the contractors, for the reason that there was no assignment of the order to the United States. Certainly the indirect or general benefit which might be said to accrue or enure to the Government by virtue of the purchase of materials by the contractors, in furtherance of their obligations under the contract, did not affect the legal title to the property, nor prevent the consummation of the purchase between the vendor and the contractors. Unless the right of assignment of the order had been executed, there was no privity of contract between the vendor and the Government. See *Kruse v. Revelson*, 115 Ohio State 594, 55 A. L. R. 289, 155 N. E. 137 (1927); *United Painting & Decorating Co. v. Dunn*, 137 Ga. 307, 73 S. E. 493 (1912); Cf. *United States v. Driscoll*, 96 U. S. 421 (1877); *Herfurth v. United States*, 89 C. Cls. 122, 127 (1939); *Alexander v. Alabama Western R. R. Co.*, 179 Ala. 480, 60 So. 295 (1912)).

The provision of the contract (Article I (3), R. 16) under which title to materials may be vested in the Government prior to installation has no field of operations prior to the consummation of the pur-

chase by the contractors. We do not think it requires any argument to show that the shipment and delivery of the materials to the Constructing Quartermaster for the account of the contractors, in legal effect, would be the shipment and delivery to the contractors direct, so far as such incident affects any question here involved. Clearly, the Constructing Quartermaster in receiving such shipment was either acting as agent for the contractors, or would be construed as receiving and holding the materials in trust for the contractors. The contractors, the taxpayers, of course, still claimed and enjoyed a right of ownership therein, and, for profit, subsequently made actual use of the materials.

The record fails to show that there was any formal written "acceptance in writing by the Contracting Officer" of the materials here involved prior to installation, as contemplated by the title provisions mentioned above. It seems doubtful that the routine receiving and inspection reports (R. 73, 74) were intended by the parties as a strict compliance with the title provisions of the contract.

Such title provision was inserted in the contract form pursuant to Section 4 (c) of the Act of April 25, 1939 (Public No. 43, 76th Congress, 1st Session, c. 87), which authorized the Secretary of the Navy to include such provision "to minimize insurance costs."

Furthermore, the contractors retained a beneficial use therein—the right to use the materials in the performance of the construction in compliance

with their contractual obligations. Such privilege or right was a taxable event as between the State and the contractors, and the Government by the terms of the contract had waived any right to object to the consequential burden of such a non-discriminatory tax, the very *form* of which contract was expressly authorized by Act of July 2, 1940 (Appendix, *infra*, p. 58).

Even if the conclusion is reached that title to the materials became vested in the Government, such title was acquired from the contractors either contemporaneously with or subsequent to the delivery of the materials at Fort McClellan, Alabama, and under the decisions of this Court, such a transaction unquestionably had its "taxable moment." See *Sou. Pac. v. Gallagher*, 306 U. S. 167, *supra; Pacific Tel. & Tel. Co. v. Gallagher*, 306 U. S. 182, 186, 187, *supra;* and *Dept. of Treasury of the State of Indiana v. Preserving Corp.*, 85 L. Ed. 817, *supra.*

Reference is here made to the brief filed on behalf of Petitioner in the companion case of *State of Alabama, Petitioner v. King and Boozer, et al*, No. 602, for further duscussion of questions relating to the purchase and use of materials by the contractors (pp. 35-42 of such brief).

C. THE CONTRACTORS IN THE PURCHASE AND USE OF THE MATERIALS, WERE INDEPENDENT CONTRACTORS.

In support of this point, reference is made to the rationale of the brief in the companion case of *State of Alabama, Petitioner v. King and Boozer, et al*, No. 602 (See pp. 42-52 of such brief).

In the passage of the Act of July 2, 1940, (Appendix, *infra* p. 58) under which the "cost-plus-a-fixed-fee *form* of contract" here involved (R. 13-41) was authorized and executed, Congress well understood and clearly intended that the relationship of the contractors to the Government and their status would be that of independent contractors, both in furnishing materials and in performing the work of construction. And, that such contractors in one instance would be left subject to nondiscriminatory sales and use taxes, except where the contractors enjoyed the protection of Federal jurisdiction over the area of activity, and in the other instance would be subject to Federal Social Security and State Unemployment Compensation taxes, even upon Federal areas.

To refute such construction, it would be necessary to charge Congress with ignorance of the many decisions of this and other Courts that the relationship of Government contractors is not such as to confer upon the contractor the immunity of the sovereign. Certainly Congress was aware of such historic

decisions as *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937), and *Silas Mason & Co. v. Tax Commission*, 302 U. S. 186, (1937) in which the contractors were held subject to State taxation even upon their gross income from the Government.

But in this instance it is not necessary to glean the legislative intent from fields of speculation. Congress said what it meant, and meant what it said. The contract was to produce a contractor, not create an unheard of governmental instrumentality with guaranteed private profits upon the entire cost, clothed with an immunity from taxation for which state and federal contractors have fought in vain for over a century.

And it would certainly be extravagant to charge that Congress unwittingly authorized the creation by contract of an agent who, in the magic of his own name, could contract for the Government with mine, merchant and factory, without imposing legal liability upon his principal or subjecting himself to the State's constitutionally reserved power of taxation yet, in all other respects would remain a prosaic contractor subject to the burdens of Federal Social Security and State Unemployment Compensation taxes.

It must be remembered that this same Congress had only a few days before (on June 4th and 5th, 1940) debated and defeated such a proposal in the

consideration of another National Defense bill. (Senate Amendment No. 120 to H. R. 8438 Act of June 11, 1940, Pub., No. 588, 76th Cong., 3rd Sess., C. 313). Yet that which the legislative branch of the Government in no uncertain manner rejected is now being sought by strained construction from the judicial. But, it is said, the contractors have no stake at issue. That the invalidation of the tax will not increase their profit, or the payment impose a burden, as they hold a valid contract for reimbursement. However, if the Court concludes the supervision and control by the Government over purchases is sufficient to create the relationship of principal and agent, it is difficult to see how their independence in the work of construction may at the same time be so preserved as to compel them to pay Social Security and Unemployment Compensation taxes.

D. THE CONTRACTORS WERE NOT INSTRUMENTALITIES OF THE UNITED STATES.

On this point, we adopt by reference the rationale of the brief in the companion case of *State of Alabama, Petitioner v. King and Boozer, et al*, No. 602 (See pp. 52-57 of such brief).

E. THE POWER OF THE STATE TO IMPOSE NONDISCRIMINATORY TAXATION UPON INDEPENDENT CONTRACTORS IS NOT AFFECTED BY THE FORM OR TERMS OF THE CONTRACT.

In support of this point, we adopt by reference the rationale of the brief in the companion case of *State of Alabama, Petitioner v. King and Boozer, et al*, No. 602 (See pp. 57-62 of such brief).

F. THE GOVERNMENT'S IMPLIED CONSTITUTIONAL IMMUNITY FROM STATE TAXATION DOES NOT EXTEND TO INDEPENDENT CONTRACTORS.

In support of this point, we adopt by reference the rationale of the brief in the companion case of *State of Alabama, Petitioner v. King and Boozer, et al*, No. 602 (See pp. 62-66 of such brief).

G. THE TAX IS NOT INVALID BY REASON OF THE RATE OR AMOUNT THEREOF.

In support of this point, we adopt by reference the rationale of the brief in the companion case of *State of Alabama, Petitioner v. King and Boozer, et al*, No. 602 (See pp. 66-70 of such brief).

II

THE UNITED STATES CONSENTED TO THE TAX UPON THE CONTRACTORS.

In support of this point, we adopt by reference the rationale of the brief in the companion case of *State of Alabama, Petitioner v. King and Boozer, et al*, No. 602 (See pp. 70-79 of such brief).

The clause in the contract providing for the payment by the contractors of certain taxes, and reimbursement therefor, as a part of the cost of construction, as other items of cost under Article II of the contract (Article II 1 (m), R. 19) reads as follows:

> "(m) Payments from his own funds made by the Contractor under the Social Security Act, and any applicable State or local taxes, fees, or charges which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization. materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees, and royalties on patents used including those owned by the Contractor."

It will be noted that the contractor was required to pay the Federal Social Security tax "from his own funds." It is evident that the quoted words had ref-

erence to that portion of the Social Security tax imposed upon the employer, and was no doubt intended to make it clear that he would not be permitted to escape his portion of the tax or contribution, and also was intended to limit the amount of reimbursement to the contractors' share only. Although he deducts and remits the employe's share of the contribution or tax, he was not to profit thereby.

The word "applicable", inserted with respect to the payment of State and local taxes required to be paid by the contractor "on or for" materials, etc., was apparently inserted to cover contingencies or conditions which, in some instances, would prevent the application of any State tax with respect to materials. As, for instance, where exclusive jurisdiction had been ceded by the State to the Government over the area upon which the otherwise taxable transaction might occur. (See *State of Alabama v. Algernon Blair*, 238 Ala. 377, 191 So. 237 (1939); Cf. *O'Pry Heating and Plumbing Company v. State*, 3 So. (2d) 316 (1941).) The terms of the cession to the Government of Federal areas, and the reservations or restrictions therein, in many instances, involved difficult questions of construction, as to whether the State had the power or right to impose a particular tax. *Buckstaff Bath House v. McKinley*, 308 U. S. 358 (1939); *James v. Dravo Contracting Co.*, 302 U. S. 134, supra; *Silas Mason Co. v. Tax Comm.*, 302 U. S. 186, *supra; Atkinson v.* Tax *Comm.* 303 U. S. 20 (1938). *Cf. Stewart & Co. v. Sadrakula*, 309 U. S. 94 (1940).

It will be remembered that at the time of the adoption of the form of contract involved in this case (C. P. F. F. Form No. 1, approved by the Assistant Secretary of War July 12, 1940) the question of imposing sales and use taxes upon Federal areas had not been acted upon by Congress. (1) It is, therefore, our contention that these circumstances presented instances in which the tax might not be applicable even though demanded by the State.

The adoption of the Buck Resolution (Appendix, *infra*, p. 61), effective after December 31, 1940, thereafter restored to the several States power and jurisdiction to impose sales and use taxes upon Federal areas to the same extent and in the same manner as though such area was not a Federal area. Therefore, we believe that upon a proper construction of the tax provision in the contract, it will be seen that the term "applicable", with respect to State sales and use taxes, was not inserted with reference to any governmental immunity intended to be conferred upon the contractors, in their person or property. Our construction is supported by the fact that there was no statue authorizing the appointment, designation, or employment of contractors, *as agents*, or authorizing them to act as agent of the Government, or conferring upon them any general or specific immunity or exemption from State taxation. There was no provision in the contract to such effect, nor had any authoritative Court decision been

(1) See Act of October 9, 1940, Public, No. 819, 76th Congress, 3rd Session, c. 787 (Appendix, *infra*, p. 61).

rendered holding Government contractors immune by reason of their status or relationship, under any form of contract.

It is true that the word "applicable" as there used would also cover any instance where the tax might be discriminatory or otherwise invalid. In such case, the contractor would be required to resist the demand.

But, it would be difficult to draft a provision more specifically consenting and agreeing that the various State and local taxes, of a nondiscriminatory character, required to be paid by the contractor in purchasing or using materials in the performance of the contract within areas subject to State jurisdiction, should be so paid, and that the amount thereof would be reimbursed to the contractor as other items included in the cost of the construction, with the result that the consequent economic burden would thereby be assumed by the Government as a contractural obligation.

III

THE USE TAX APPLIED WITH RESPECT TO MATERIALS STORED OR USED BY THE CONTRACTORS WITHIN THE MILITARY RESERVATION OF FORT McCLELLAN, ALABAMA.

All of the transactions, including the purchase and use of the materials here involved, occurred between

January 1, 1941, and March 31, 1941 (R. 64, 68), after the effective date of the Buck Resolution (Act. of October 9, 1940, Public, No. 819, 76th Congress, 3d Session, c. 787) (Appendix, *infra*, p. 61), in and by which Congress expressly consented to the application of State sales and use taxes upon Federal areas.

One of the evident purposes of this Act was to subject Government contractors to such nondiscriminatory State taxation in any State, regardless of the terms of the cession to the United States, or the various restrictions imposed by the different States. See *Silas Mason Co. v. Tax Commission*, 302 U. S. 186, *supra; James v. Dravo Contracting Company*, 302, U. S. 134, *supra; Henneford v. Silas Mason Co.*, 300 U. S. 577, *supra.*

In view of the adoption and effectiveness of the Buck Resolution, we do not deem it necessary to further discuss the applicability of the use tax as imposed upon the contractors within the Federal area of Fort McClellan, Alabama. The Use Tax Act specifically included areas "owned by or ceded to the United States." (Section I (k), Appendix, *infra*, p. 43).

CONCLUSION

The storage or use of the tangible personal property involved in this case was with respect to tangible personal property, in this case building materials, purchased by the contractors, as consumers, at retail, and stored or used by them within the meaning of the Alabama Use Tax Act. Since the contractors are shown to have purchased, stored, and used the materials in their capacity as independent contractors, during a period within which the objection of exclusive Federal jurisdiction had been removed, the tax was applicable, and in no wise repugnant to the Constitution of the United States. Furthermore, since Congress approved the contract, including the provision for the payment of and reimbursement for such taxes as a part of the construction cost, the Government may not intervene or otherwise prevent the payment of the tax by the contractors, solely for the purpose of being relieved of its consequent economic burden. Therefore, the decree of the Court below is erroneous and should be reversed.

Respectfully submitted,

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APPENDIX

General Acts of Alabama, Regular Session and Special Session, 1939, Act No. 67:

Section 1. DEFINITIONS. The following words, terms and phrases when used in this act shall have the meaning ascribed to them in this Section, except where the context indicates a different meaning: (a) The term "person" or the term "company" herein used interchangeably, includes any individual, firm, company, partnership, association, corporation, receiver or trustee, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context. (b) The term "Department" means the Department of Revenue of the State of Alabama. (c) The term "Commissioner" means the Commissioner of Revenue of the State of Alabama. (d) The term "wholesale sale" or "sale at wholesale" means a sale of tangible personal property by wholesalers to licensed retail merchants, jobbers, dealers, or other wholesalers for resale and does not include a sale by wholesalers to users or consumers not for resale. The term "wholesale sale" shall include a sale of tangible personal property or products (including iron ore) to a manufacturer or compounder which enters into and becomes an ingredient

or component part of the tangible personal property or products which he manufactures or compounds for sale, and the furnished container and label thereof. (e) The term "sale at retail" or "retail sale" shall mean all sales of tangible personal property except those above defined as wholesale sales. The quantities of goods sold or prices at which sold are immaterial in determining whether or not a sale is at retail. Sales of building materials to contractors, builders or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold. Sales of tangible personal property or products to manufacturers, quarry operators, mine operators or compounders, which are used or consumed by them in manufacturing, mining, quarrying or compounding and do not become an ingredient or component part of the tangible personal property manufactured or compounded are retail sales. (f) The word "business" as used in this act, shall include all activities engaged in, or caused to be engaged in, with the object of gain, profit, benefit or advantage, either direct or indirect, and not excepting sub-activities producing marketable commodities used or consumed in the main business activity, each of which sub-activities shall be considered business engaged in, taxable in the class in which it falls. (g) The term "storage" means and includes any keeping or retention in this State for any purpose except sale in the regular course of

business or subsequent use solely outside this state of tangible personal property purchased at retail. (h) The term "use" means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, or by any transaction where possession is given, except that it shall not include the sale of that property in the regular course of business. (i) The term "purchase" means acquired for a consideration, whether such acquisition was affected by a transfer of title, or of possession, or of both, or a license to use or consume; whether such transfer shall have been absolute or conditional, and by whatsoever means the same shall have been affected; and whether such consideration be a price or rental in money, or by way of exchange or barter. (j) The term "sales price" means the total amount for which tangible property is sold, including any services (including transportation) that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest charged, losses or any other expenses whatsoever; provided, that cash discounts allowed and taken on sales shall not be included and sales price shall not include the amount charged for property returned by customers when the en-

tire amount charged therefor is refunded either in cash or by credit. (k) The term "in this state" or "in the state" means within the exterior limits of the State of Alabama, and includes all territory within such limits owned by or ceded to the United States of America.

Section II. (a) An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased at retail on or after the effective date of this act, for storage, use or other consumption in this state at the rate of two per cent (2%) of the sales price of such property, except as provided in subsection (b) of this section. (b) An excise tax is hereby imposed on the storage, use or other consumption in this state of any automotive vehicle purchased at retail on or after the effective date of this act, for storage, use or other consumption in this state at the rate of one-half of one per cent (½ of 1%) of the sales price of such automotive vehicle. Every person storing, using or otherwise consuming in this State tangible personal property purchased at retail shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to the State; provided, however, that a receipt from a retailer maintining a place of business in this State or a retailer

authorized by the Department, under such rules and regulations as it may prescribe, to collect the tax imposed hereby and who shall for the purposes of this act be regarded as a retailer maintaining a place of business in this State, given to the purchaser in accordance with the provisions of Section V. hereof, shall be sufficient to relieve the purchaser from further liability for a tax to which such receipt may refer.

Section III. EXEMPTIONS. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act: (a) Property, the gross proceeds of sales of which are required to be included in the measure of the tax imposed by the provisions of House Bill 179, approved February 23, 1937 and known as the Alabama Luxury Tax Act or by the provisions of House Bill 82 approved February 8, 1939 and known as "An Act to Further Provide for the General Revenue of the State of Alabama." (b) Property, the storage, use or other consumption of which this state is prohibited from taxing under the constitution or laws of the United States of America or under the constitution of this state. ***** (d) Property stored, used or consumed by the State of Alabama, by the counties within the State, or by incorporated municipalities of the State of Alabama. *****

Section IV. Every seller of tangible personal property for storage. use or other consumption in this state, engaged in the business of selling at retail in this state, shall within thirty days after the effective date of this act, register with the Department and give the name and address of each agent operating in this state, the location of any and all distribution or sales houses or offices or other places of business in this state and such other information as the Department may require with respect to matters pertinent to the enforcement of this act; Provided, That it shall not be necessary for a seller, holding a license obtained pursuant to the provisions of House Bill 82 approved February 8, 1939 and any amendments thereto, to register with the Department as provided in this act.

Section V. Every such seller making sales of tangible personal property for storage, use or other consumption in this state, not exempted under the provisions of Section III, hereof, shall at the time of making such sales or, if the storage, use or other consumption of the tangible personal property is not then taxable hereunder, at the time of such storage, use or other consumption becomes taxable hereunder, collect the tax imposed by this act from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the Department. The

tax required to be collected by the seller from the purchaser shall be displayed separately from the list, advertised in the premises, marked or other price on the sales check or other proof of sales. It shall be unlawful for any such seller to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by the seller or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this Section shall be guilty of a misdemeanor. The tax herein required to be collected by the seller shall constitute a debt owed by the seller to this state.

Section VI. The tax imposed by this act shall be due and payable to the Department quarterly on or before the twentieth day of the month next succeeding each quarterly period during which the storage, use or other consumption of tangible personal property became taxable hereunder, the first of such quarterly periods being the period commencing with the first day of March, 1939, and ending the thirtieth day of June, 1939. Every such seller maintaining a place of business in this state shall on or before the twentieth day of the month following the close of the first quarterly period as above defined,

and on or before the twentieth day of the month following each subsequent quarterly period of three months, file with the Department a return for the preceding quarterly period in such form as may be prescribed by the Department showing the total sales price of the tangible personal property sold by such seller, the storage, use or consumption of which became subject to the tax imposed by this act during the preceding quarterly period and such other information as the Department may deem necessary for the proper administration of this act. The return shall be accompanied by a remittance of the amount of tax herein required to be collected by the seller during the period covered by the return. The Department, if it deems it necessary in order to insure payment to the State of the amount of tax herein required to be collected by sellers, may require returns and payment of such amount of tax for other than quarterly periods. Returns shall be signed by the seller or his duly authorized agent but need not be verified by oath. Every person purchasing tangible personal property, the storage, use or other consumption of which is subject to the tax imposed by this act, and who has not paid the tax due with respect thereto to a seller required or authorized hereunder to collect the tax, shall on or before the twentieth day of the month following the close of the first quarterly period as above defined, and on or before the

twentieth day of the month following each subsequent quarterly period of three months, file with the Department a return for the preceding quarterly period in such form as may be prescribed by the Department showing the total sales price of the tangible personal property purchased by such person, the storage, use or other consumption of which became subject to the tax imposed by this act during the preceding quarterly period, and with respect to which the tax was not paid to a seller required or authorized hereunder to collect the tax, and such other information as the Department may deem necessary for the proper administration of this act. The return shall be accompanied by a remittance of the amount of tax herein imposed and not paid to a seller required or authorized hereunder to collect the tax during the period covered by the return. The Department, if it deems it necessary in order to insure payment to the state of the amount of such tax may require returns and payment for other than quarterly periods. Returns shall be signed by the person liable for the tax or his duly authorized agent, but need not be verified by oath. For the purpose of the proper administration of this act and to prevent evasion of the tax and the duty to collect the same herein imposed, it shall be presumed that tangible personal property sold by any person for delivery in this state is sold for storage, use or other consumption in this

state unless the person selling such property shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchaser to the effect that the property was purchased for resale and it shall be further presumed that tangible personal property shipped to this state by the purchaser thereof was purchased from a retailer on and after March 1st, 1939, for storage, use or other consumption in this state.

Section VII. Any person failing to pay any tax to the State or any amount of tax herein required to be collected and paid to the State, except amounts determined to be due by the Department under the provisions of Sections VIII and IX hereof, within the time required by this act shall pay in addition to the tax or the amount of tax herein required to be collected a penalty of ten per cent (10%) thereof, plus interest at the rate of one-half of one per cent (½ of 1%) per month, or fraction thereof, from the date at which the tax or the amount of tax herein required to be collected became due and payable to the State.

Section VIII. If the Department is not satisfied with the return and payment of the tax or amount of tax herein required to be paid to the State by any person, it is hereby

authorized and empowered to compute and determine the amount required to be paid based upon the facts contained in the return or upon any information within its possession or that shall come into its possession. All amounts determined to be due under the provisions of this Section shall bear interest at the rate of one-half of one per cent (½ of 1%) per month, or fraction thereof, from the twentieth day after the close of the period or periods, as the case may be, for which such amounts were required to be reported to the Department until paid. If any part of the deficiency for which a determination of an additional amount due is made is due to negligence or intentional disregard of the act or authorized rules and regulations, a penalty of ten per cent (10%) of such amount shall be added thereto. If any part of the deficiency for which a determination of an additional amount due is made is due to fraud or an intent to evade the act or authorized rules and regulations, a penalty of twenty-five per cent (25%) of such amount shall be added thereto. The Department shall give to the retailer or person storing, using or consuming tangible personal property written notice of its determination. Such notice may be served personally or by mail. If by mail, said notice shall be addressed to the retailer or person storing, using or consuming tangible personal property at his address as the same appears in the records of the Department and

sent by registered mail, return receipt requested.

Section IX. If any person neglects or refuses to make a return required to be made by this act, the Department shall make an estimate for the period or periods in respect to which such person failed to make a return, based upon information in its possession or that may come into its possession, of the amount of the total sales price of tangible personal property sold or purchased by such person, the storage, use or other consumption of which in this State is subject to the tax imposed by this Act, and upon the basis of said estimate compute and determine the amount required to be paid to the State, adding to the sum thus arrived at a penalty equal to ten per cent (10%) thereof. All amounts determined to be due under the provisions of this Section shall bear interest at the rate of one-half of one per cent (½ of 1%) per month, or fraction thereof, from the twentieth day after the close of the period or periods, as the case may be, for which such amounts were required to be reported to the Department until paid. If the neglect or refusal of any person to file a return as required by this act was due to fraud or an intent to evade this act or rules and regulations hereunder, a penalty of twenty-five per cent (25%) of the amount required to be paid by such person shall be added thereto in addition to the ten

per cent (10%) penalty as above provided. Promptly thereafter the Department shall give to such person written notice of such estimate, determination and penalty, the notice to be served personally or by mail in the same manner as prescribed for service of notice by the provisions of Section VIII hereof.

Section XI. Any person from whom an amount is determined to be due under the provisions of Section VIII or IX hereof may petition for a redetermination thereof within thirty days after service upon such person of notice thereof. If a petition for redetermination is not filed within said thirty-day period, the amount determined to be due becomes final at the expiration thereof. If a petition for redetermination is filed within said thirty-day period, the Department shall reconsider the amount determined to be due, and if such person has so requested in his petition, shall grant such person, his agent or attorney an oral hearing and shall give such person ten days' notice of the time and place thereof. The Department shall have power to continue the hearing from time to time as may be necessary. The order or decision of the Department upon a petition for redetermination shall become final thirty days after service upon such person or notice thereof. All amounts determined to be due by

the Department under the provisions of Section VIII or IX hereof shall become due and payable at the time they become final and if not paid when due and payable there shall be added thereto a penalty of ten per cent (10%) of the amount determined to be due. Any notice required by this Section shall be served personally or by mail in the same manner as prescribed for service of notice by the provisions of Section VIII hereof.

Section XV. All taxes or amounts herein required to be collected not paid to the Department on the date when the same becomes due and payable shall bear interest at the rate of one-half of one per cent (½ of 1%) per month, or fraction thereof, from and after the date the when same became due and payable until paid.

Section XVI. If upon examination it is determined by the department that an amount of tax or an amount required to be collected has been paid to the state in excess of the amount properly due, then the amount in excess shall be credited against any tax or amount required to be collected then due from such person and any balance of such excess shall be refunded to such person by whom such overpayment was made, by certificate of overpayment issued by the Department to the

State Comptroller. If approved by the Comptroller, he shall draw his warrant on the State Treasurer for the amount so certified to be due.

Section XVII. If fraud or evasion on the part of any person is discovered by the department, it shall determine the amount by which the state has been defrauded, shall add to the amount so determined a penalty equal to twenty-five per cent (25%) thereof, and shall determine the same to be due from such person. All amounts determined to be due from any person under the provisions of this Section shall bear interest at the rate of one-half of one per cent (½ of 1%) per month, or fraction thereof, from the fifteenth day after the close of the period or periods, as the case may be, for which such amounts should have been paid. The amount so determined shall be immediately due and payable and if not paid within ten days after the service upon such person of notice of the amount determined to be due, the delinquency penalty and interest provided in Section VII hereof shall attach thereto.

Section XVIII. The tax or any amount required to be collected hereunder together with interest and penalties imposed by this Act shall be a lien upon the property of the person required to pay such tax or other

amount to the State, and the provisions of the revenue laws of the State of Alabama applying to liens for license taxes shall apply fully to the taxes herein levied.

Section XXII. All taxes, fees, interest and penalties imposed and all amounts of tax herein required to be paid to the state under this act must be paid to the Department of Revenue at Montgomery, Alabama, with remittances payable to the State Treasurer of Alabama. The funds received or collected by the Department under the provisions of this act shall be, without delay, deposited in the State Treasury. The amount remaining after payment of all expenses incurred by the Department in the collection of such funds or the administration of this act, shall be paid into the Special Educational Trust Fund to be expended only for salaries of teachers in the elementary and high schools of the State.

Section XXIV. No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin under this act the collections of any tax or any amount of tax herein required to be collected; but after payment of any such tax or any such amount of tax herein required to be col-

lected under protest, duly verified and setting forth the grounds of objection to the legality thereof, the retailer or person making the payment may bring an action against the Commissioner of Revenue in the Circuit Court of Montgomery County, Alabama, in equity, praying a declaratory judgment determining his tax liability for the amount so paid or his rights to a refund thereof. From the decree of the Circuit Court either the Commissioner or the person making the payment may appeal direct to the Supreme Court within thirty days and such appeal shall be a preferred case. Upon the rendition of any final judgment declaring that the person making the payment is entitled to a refund thereof, either in whole or in part, then it shall be the duty of the State Comptroller or other proper officer upon presentation of a certified copy of such final decree to issue his warrant in favor of such person for the sum determined to be due together with interest at six (6%) per cent per annum. No such action may be instituted more than one year after the tax or the amount herein required to be collected and paid to the State becomes due and payable, and failure to bring suit within said one year shall constitute waiver of any and all demands against the State on account of alleged overpayments hereunder. In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the Commissioner to

recover any amount paid hereunder when such action is brought by or in the name of an assignee of the seller or other person paying said amount, or by any person other than the person who has paid such amount.

Section XXV. Any seller or other person failing or refusing to furnish any return hereby required to be made, or failing or refusing to furnish a supplemental return or other data required by the Department, or rendering a false or fradulent return, shall be guilty of a misdemeanor and subject to a fine of not exceeding five hundred dollars ($500) for each such offense. Any person required to make, render, sign or verify any report as aforesaid, who makes any false or fradulent return, with intent to defeat or evade the determination of an amount due required by law to be made, shall be guilty of misdemeanor, and shall for each such offense be fined not less than three hundred dollars ($300) and not more than five thousand dollars ($5,000) or be imprisoned not exceeding one year in the county jail or be subject to both said fine and imprisonment in the discretion of the court.

Section XXVI. Any violation of the provisions of this act, except as otherwise herein provided shall be a misdemeanor and punishable as such.

Section XXVII. That the provisions of this Act are severable and if any section or sections, paragraph or paragraphs, sentence or sentences, clause or clauses, phrase or phrases, word or words of this act shall be held unconstitutional by the valid judgment or decree of any court of competent jurisdiction, the same shall not affect or impair any of the remaining provisions, sections, paragraphs, sentences, clauses, phrases and, or words of this act. It is hereby declared to be the legislative intent that this act and each section, paragraph, sentence, clause, phrase or word thereof would have been enacted had such unconstitutional section or sections, paragraph or paragraphs, sentence or sentences, clause or clauses, phrase or phrases and word or words not been included herein.

Approved February 28, 1939.

Act of July 2, 1940, Pub., No. 703, 76th Cong., 3d Sess., c. 508:

SEC. 1. In order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations,

or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; (2) to provide for the development, purchase, manufacture, shipment, maintenance, and storage of military equipment, munitions, and supplies, and for shelter, at such places and under such conditions as he may deem necessary; and (3) to enter into such contracts (including contracts for educational orders, and for the exchange of deteriorated, unserviceable, obsolescent, or surplus military equipment, munitions, and supplies for other military equipment, munitions, and supplies of which there is a shortage), and to amend or supplement such existing contracts, as he may deem necessary to carry out the purposes specified in this section: *Provided*, That the limitations contained in sections 1136 and 3734 of the Revised Statutes, as amended, and any statutory limitation with respect to the cost of any individual project of construction shall be suspended until and including June 30, 1942, with respect to any construction authorized by this Act: *Provided further*,

That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes," approved June 30, 1936, (49 Stat. 2036; U. S. C., Supp. V, Title 41, secs. 35-45), shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section: *Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.

Military Appropriation Act, 1941, Public No. 611, 76th Congress, 3d Sess., c. 343:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Military Establishment for the fiscal year ending June 30, 1941, and for other purposes, namely: * * * * * *

* * * * * * * * emergency construction, $47,976,962, including the acquisition of necessary land therefor, without regard to the provisions of sections 355 and 1136, Revised Statutes, as amended (10 U. S. C. 1339; 40 U. S. C. 255); * * * * * * * * *

Act of October 9, 1940, Pub., No. 819, 76th Cong., 3d Sess., c. 787:

SEC. 1. (a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940.

SEC. 3. (a) The provisions of sections 1 and 2 of this Act shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser. (b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of Army or Navy personnel, under regulations promulgated by the Secretary of war or the Secretary of the Navy.